**BEFORE**
**THE PUBLIC SERVICE COMMISSION OF**
**SOUTH CAROLINA**
**DOCKET NO. 2017-207-E**

**IN RE:**

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| Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent | ) ) ) ) ) | SCE&G'S MOTION TO DISMISS COMPLAINT/PETITION OF FRIENDS OF THE EARTH AND SIERRA CLUB |

## INTRODUCTION AND SUMMARY

South Carolina Electric and Gas ("SCE&G") hereby moves under 10 S.C. Code Ann. Regs. 103-829 (2012) to dismiss the Complaint/Petition filed jointly by the Friends of the Earth and the Sierra Club (the "Complainants"). SCE&G also requests that the Commission suspend the schedule for pre-filing testimony in this docket and all discovery in this matter, and issue a revised pre-filing schedule if one is needed after this motion has been decided.

The grounds for this motion are that the Complainants seek relief which, in each instance, is either statutorily prohibited or premature until the utility files for Commission review of proposed adjustments in its construction plans or BLRA approved costs. Those adjustments are under active consideration as is the path forward for the project. The Company has stated on numerous occasions that it will file for review and approval of those adjustments once the path forward is known and the required adjustments have been identified and quantified. This is anticipated to take place in the current quarter.

A summary of the grounds for dismissing the Complaint/Petition is as follows:

**Reparations**: The Complainants ask the Commission to order the Company to pay "reparations" to its customers. But directly controlling South Carolina Supreme Court precedent only allows refunds or reparations where a utility has charged ratepayers amounts in excess of

lawfully established rates. See *S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n*, 275 S.C. 487, 490, 272 S.E.2d 793, 795 (1980); *accord, Hamm v. Cent. States Health & Life Co. of Omaha*, 299 S.C. 500, 504, 386 S.E.2d 250, 253 (1989). All rates charged by SCE&G have been charged under lawfully-issued, final and binding orders of the Commission. Therefore, the claim for reparations is legally defective on its face and should be dismissed.

**Cease and Desist Construction:** The Complainants asks the Commission to order SCE&G to "cease and desist" from funding continued construction of the two new nuclear units (the "Units"). The Complainants cite no legal authority allowing the Commission to issue such an order and there is none. The request further ignores the fact that in 2009 the Commission issued a Siting Act certificate for the Units which was unanimously upheld as lawful by the South Carolina Supreme Court. *Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 364, 369, 692 S.E.2d 910, 912, 915 (2010); *see also*, S.C. Code Ann. § 58-33-270(A) and §58-33-275(B). The requested order would abrogate that certificate. Therefore claims seeking a cease and desist order are legally defective and should also be dismissed.

**Prudency Review:** The Complainants seeks a prudency review of SCE&G's decisions regarding construction of the Units independent of any filing by the utility for updates to outstanding BLRA orders or for revised rates. This request is contrary to the finality provision of the BLRA, S.C. Code Ann. § 58-33-275(B), which prohibits such a review until the utility files a petition seeking approval under S.C. Code Ann. §§ 58-33-270(E) of changes in construction plans, costs schedules or abandonment decisions or seeks to recover associated costs through revised rates filings under S.C. Code Ann. § 58-33-280. *See* S.C. Code Ann. § 58-33-275(B) and (E). Accordingly, these claims are legally defective and should be dismissed.

**Alternative Generation Capacity:** The Complainants asks the Commission to evaluate "the available least cost efficiency and renewable energy alternatives" to completion of nuclear capacity. Until decisions related to the future plans for the Units are made and presented to the Commission for review there is no statutory basis to evaluate "renewable energy alternatives" as a substitute for completing the Units. Such claims are derivative of the Complainants' other claims, and therefore is similarly premature and should be dismissed.

**Ripeness and Administrative Economy:** Ripeness involves an evaluation of the fitness of claims for resolution at the time they are presented for review and the burden on the parties that would result from postponing review until they are more fit for resolution. *See Waters v. S.C. Land Res. Conservation Comm'n,* 321 S.C. 219, 227–28, 467 S.E.2d 913, 918 (1996). SCE&G is actively working to identify the most prudent path forward for the project and to quantify the associated cost and plan adjustments that it will ask the Commission to approve under the BLRA. Until SCE&G has completed this work, the claims in the Complaint/Petition are poorly suited for determination and therefore not ripe. Furthermore, it will impose little if any burden on the Complainants to await the SCE&G's review and evaluation process and the filing of definitive claims for relief under the BLRA. For those reasons, the Complainants' claims fail the ripeness test.

**Conclusion:** The Complaint/Petition contains no claims that can support an adjudicatory proceeding before the Commission. Dismissal of the Complaint/Petition in its entirety is therefore warranted.

## FUTURE PROCEEDINGS

As SCE&G has stated repeatedly, it intends to file for a full and comprehensive review of its decisions related to the Units once it and the project's co-owner, Santee Cooper, have reached a decision about the future of the project and have identified the adjustments to costs and construction plans that are warranted. Those decisions are anticipated to be made on or before September 30, 2017, with regulatory filings to be made promptly thereafter. In the ensuing proceedings, the Commission, the Office of Regulatory Staff ("ORS") and the parties here will have the opportunity to conduct or participate in a full and statutorily-authorized inquiry into the prudency of the cost and schedule adjustments presented, the decision to abandon one or both Units if such a decision is made, and any other relief requested under the BLRA. Until that time, there are no matters ripe for review, and no statutory basis for the Commission to conduct a review. The filing of that future proceeding would also make any proceeding based on the Petition moot.

## FACTUAL BACKGROUND

On March 29, 2017, the day that Westinghouse filed for bankruptcy, SCE&G requested an allowable ex parte communication briefing before the Commission to discuss this matter. That proceeding was held on April 12, 2017, and SCE&G's Chairman and Chief Executive Officer, Mr. Kevin Marsh; its Chief Operating Officer and President of Generation and Transmission, Mr. Stephen Byrne; and its Executive Vice President and Chief Financial Officer, Mr. Jimmy Addison, all appeared to brief the Commission and respond to questions. As Mr. Marsh indicated at that hearing:

> SCE&G and Santee Cooper are evaluating their options for continuing or canceling the units. The options presently being considered by SCE&G include: continue with the construction of both units; focus on construction of one unit and delay construction of the other; continue with construction of one unit, abandon the other, and

> seek recovery of the abandoned unit under the BLRA; or abandon the project and seek recovery under the BLRA. Other options may arise during our review.
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> . . . .
>
> As you would expect, a primary goal of the evaluation is to validate the cost to complete the units that was provided to us by Westinghouse. Our New Nuclear team, supported by outside experts, is reviewing the inputs and assumptions used to generate this cost estimate. We cannot currently validate this estimate because we have not yet completed our evaluation.
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> . . . .
>
> In past BLRA proceedings, we have assessed the relative costs and benefits of completing the units against the costs and benefits of canceling the units and relying on other sources of generation. The evaluation we plan to conduct of our current operation will involve a similar assessment. When appropriate information as to cost and other matters is available, we plan to assess the relative costs and benefits of completing or canceling the units, just as we have in the past. That assessment would include a review of multiple assumptions, consistent with our system modeling and the Integrated Resource Plan. Such an evaluation would also consider the effect of the various alternatives on generation mix, CO2 emissions, and exposure to future fuel price risk.
>
> Once these evaluations are complete, the company plans to come before the Commission for a full review and assessment of its chosen alternative before making a final commitment to any course of action. When that will take place depends on the timing of many factors that are not known at this time.

Transcript of ex Parte Briefing (TR), ND-2017-12-E, April 12, 2017, at 10-14.

The witnesses indicated that additional evaluations were required. Those evaluations include, among others:

- Quantifying the amount of damages that will be paid to SCE&G and Santee Cooper by Westinghouse and its parent company, Toshiba;[1]
- Determining the availability of Federal Production Tax Credits to support the cost of the one of both Units if completed;[2]

[1] Payments under the Westinghouse/Toshiba guarantee are in negotiation but have been estimated to be in the range of $940 million for SCE&G alone. TR at 19.

[2] On June 20, 2017, the United States House of Representatives passed legislation introduced by Representative Tom Rice (H.R. 1551) to removed deadlines associated with Production Tax Credits for Production from Advanced Nuclear Power Facilities and make it possible for public entities like Santee Cooper to benefit from the credits. That legislation is current pending before the Senate. The value of PTCs to SCE&G if both Units qualify is estimated to be approximately $2.2 billion gross of taxes. TR at 12.

- Assessing the contractual agreements and resource requirements that must be put in place to move forward with construction of the Units: and
- Quantifying the costs of demobilization, removal and site restoration and the salvage of equipment and materials in case of cancellation.

In addition, SCE&G's selection of a path forward must be coordinated with decision-making by the executive leadership and board of the project's co-owner Santee Cooper.

## STANDARD FOR REVIEW

The standard for reviewing the validity of the claims in Complaint/Petition is a legal one: Are they within the statutory authority of the Commission? The Commission's authority is granted to it by the General Assembly through the statutes it administers. *City of Camden v. Pub. Serv. Comm'n. of S.C.* 283 S.C. 380, 382, 323 S.E.2d 519, 521 (1984). Accordingly, the Commission exercises only those powers "conferred upon it either expressly or by reasonably necessary implication by the General Assembly." *Id.; accord, Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004). Claims falling outside of the power conferred by statute are beyond the power of the Commission to consider or to grant, and therefore should be dismissed.

Accordingly, the Commission's procedural regulations require that parties seeking to initiate proceedings set out in their pleadings the precise statutory basis for the actions they request the Commission to take. *See* 10 S.C. Code Ann. Regs. § 103-824 and § 103-825(A). Under 10 S.C. Code Ann. Regs. § 103-824, complaints can be filed by "[a]ny person complaining of anything done or omitted to be done by any person under the statutory jurisdiction of the Commission **in contravention of any statute, rule, regulation or order**

**administered or issued by the Commission**." 10 S.C. Code Ann. Regs. § 103-824 (emphasis supplied). This is entirely consistent with the statute governing complaints related to electrical utilities. S.C. Code Ann. § 58-27-1940. That statute requires a "petition in writing setting forth . . . [an] act or thing done or omitted to be done by any electrical utility **in violation, or claimed violation, of any law with the commission has jurisdiction to administer** . . . ." (emphasis supplied).

As to Petitions: "Petitions shall cite by appropriate reference **the statutory provision or other authority relied upon for relief**." *Id.* at 103-825(A) (emphasis supplied).

Furthermore, complaints and petitions are contested case proceedings. Under the Administrative Procedures Act, a "contested case" means "a proceeding . . . in which the legal rights, duties, or privileges of a party are **required by law to be determined** by an agency after an opportunity for hearing." S.C. Code Ann. § 1-23-310(3) (emphasis added). As the South Carolina Supreme Court has ruled, the contested case process "is specifically defined and limited by our General Assembly," and allowing its use in unwarranted circumstances would subject "[an agency] to an overwhelming number of contested matters on everyday decisions that the General Assembly did not see fit...." *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 596, 743 S.E.2d 786, 797 (2013). Contested case proceedings are prohibited were statutory authority for a contested case proceeding is lacking, *i.e.,* where there is no statutory right to relief. *Id.*

## DISCUSSION

In their Complaint/Petition, the Complainants:

> request that the Commission initiate a formal adjudicatory proceeding to determine the prudence of acts and omissions by SCE&G in connection with the project; to consider and determine the prudence of abandonment of the subject Project and of the available least cost efficiency and renewable energy alternatives; and to remedy, abate and make due reparations for the unjust and unreasonable rates to be charged to ratepayers related thereto.

Complaint/Petition at p. 1. The Complainants also "request that the Commission order and direct SCE&G to cease and desist from expending any further capital costs related to the project . . . ." *Id.* at p. 2. Each of these requests is considered in turn.

1. **Reparations or Refunds Cannot Be Granted for Rates that Were Lawfully Authorized**

In requesting reparations, the Complainants assert that the revised rates previously authorized for the Units are unjust and unreasonable. This assertion flies in the face of the fact that one or both of the Complainants participated in five of the six contested-case, BLRA proceedings associated with the Units, including the proceeding where the current cost schedules were approved. In those proceedings, the Complainants had full rights to present evidence, cross examine witnesses, present their claims and concerns to the Commission and appeal any orders they believed to be unlawful. *See* Docket No. 2008-196-E, Order Number 2009-104(A)(Friends of the Earth); Docket No. 2009-293-E, Order Number 2010-12 (Friends of the Earth); Docket No. 2010-376-E, Order Number 2011-345 (neither)(reduction of cost estimates to remove contingencies); Docket No. 2012-203-E, Order Number 2012-884 (Sierra Club); Docket No. 2015-103-E, Order Number 2015-661(Sierra Club); Docket No. 2016-223-E, Order Number 2016-794 (Sierra Club). In two of these cases, the resulting orders have been appealed to the South Carolina Supreme Court and upheld there. *S.C. Energy Users Comm. v. S.C. Elec. & Gas,* 410 S.C. 348, 359, 764 S.E.2d 913, 918–19 (2014); *Friends of Earth v. Pub. Serv. Comm'n of*

*S.C.*, 387 S.C. 360, 364, 369, 692 S.E.2d 910, 912, 915 (2010). The specific revised rates adjustments associated with the Units have been authorized by eight final and unappealed revised rates orders issued under S.C. Code Ann. § 58-33-280. Order Number 2009-696, Docket No. 2009-211-E; Order Number 2010-625, Docket No. 2010-157-E; Order Number 2011-738, Docket No. 2011-207-E; Order Number 2012-761, Docket No. 2012-186-E; Order Number 2013-680(A), Docket No. 2013-150-E; Order Number 2014-785, Docket No. 2014-187-E; Order Number 2015-712, Docket No. 2015-160-E; Order Number 2016-758, Docket No. 2016-224-E.

The Complainants base their right to reparations on S.C. Code Ann. § 58-27-960. But the express language of that statute prohibits reparations "in any instance wherein the rate or charge in question has been authorized by law." *Id.* If the language of the statute were not enough, the South Carolina Supreme Court has made the matter doubly clear:

> Our legislature has empowered the Commission to prescribe refunds in only two specific instances. Pursuant to Code § 58-27-880, it may order a refund for the difference between new rates under bond and those ultimately found to be just and reasonable by the Commission. Additionally, the Commission may order a reparation for a past charge **in excess of the applicable rate under Code § 58-27-960**.

*S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n*, 275 S.C. 487, 490, 272 S.E.2d 793, 795 (1980)(emphasis supplied). To order reparations or refunds for rates that were lawfully imposed and lawfully collected is to invalidate a lawfully approved rate retroactively. This is illegal. *Id.* "Rate-making is a prospective rather than a retroactive process." *Id.* Under the statutes defining its powers, "[t]he Commission simply does not have any implied power to award refunds in the nature of reparations for past rates or charges; such power must be expressly conferred by

statute." *Id.* For that reason, S.C. Code Ann. § 58-27-960 may not be used to "reduce . . . past approved rates" which "were set and approved as reasonable by the Commission." *Id.*

Nine years later, the South Carolina Supreme Court revisited *S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n*, and did not waiver in its ruling: "In [the] *SCE&G* [decision cited above], we held that the PSC had no authority to direct refunds pursuant to past-approved lawful rates. We reasoned that to have empowered the PSC to direct refunds in *SCE&G*, would have permitted them to engage in retroactive ratemaking." *Hamm v. Cent. States Health & Life Co. of Omaha*, 299 S.C. 500, 504, 386 S.E.2d 250, 253 (1989).

The Complainants seek the refund of rates lawfully established through multiple orders of this Commission. Such a refund is flatly prohibited by the terms of the statute and direct, controlling precedent of the South Carolina Supreme Court. Those claims should be dismissed.

**2. The Commission's Statutes Do Not Authorize an Order Enjoining SCE&G from Continuing to Fund Construction of the Units**

Complainants also ask the Commission "to order and direct SCE&G to cease and desist" from funding further construction of the Units. Complaint/Petition at 2. They cite no statutory or other authority for such and order. There is none.

SCE&G obtained the authorizations necessary to proceed with construction of the Units in 2008-2009 when it applied for and obtained a certificate of environmental compatibility and public convenience and necessity to construct the Units under the Utility Facility Siting and Environmental Protection Act (the "Siting Act" and "Sitting Act Certificate"), S.C. Code Ann.

§§ 58-33-10, *et seq.*[3] The Siting Act Certificate is the sole authorization required from the Commission to authorize construction to proceed on a major generation plant.[4] After issuance of the certificate, the only obligation imposed on the certificate holder is to ensure that "[a]ny facility, with respect to which a certificate is required . . . [is] constructed, operated and maintained in conformity with the certificate . . . ." *Id.*

The Commission issued the Siting Act Certificate for the Units without conditions. *See*, Order No. 2009-104(A) at p. 9-56. It was appealed by the Friends of the Earth and expressly upheld as valid in all respects by the South Carolina Supreme Court:

> The Commission held a hearing on the Application, and by Order No. 2009–104(A) approved the Application of SCE&G, authorizing the construction and operation of the Facility. * * * * [B]ased on the overwhelming amount of evidence in the record, the Commission's determination that SCE&G considered all forms of viable energy

[3] Under the Commission's electric statutes, there are only a handful of statutorily-defined cases, outside of the customer service context, where a utility must seek approval for an action related to its system. These include constructing major utility assets under the Siting Act (S.C. Code Ann. §§ 58-33-10, *et seq.*), the disposition of utility property valued in excess of $1 million (S.C. Code Ann. §§ 58-27-1300); extensions of electric service into new territories (S.C. Code Ann. §§ 58-27-1210, *et seq.*); interference with service of another electric supplier (S.C. Code Ann. §§ 58-27-1280); removal of books and records from the state (S.C. Code Ann. §§ 58-27-1560 *et seq.*) production of books, records and information upon request (*id.*); issuance of securities (S.C. Code Ann. §§ 58-27-1710 *et seq.*) and approval for meters for power leaving the State (S.C. Code Ann. § 58-27-1590). The specific and limited nature of these exceptions clearly affirms the general rule that approval is not needed for other actions.

[4] The project to construct the Units is subject to comprehensive licensing and oversight by the United States Nuclear Regulatory Commission (NRC) under Section 103 of the Atomic Energy Act of 1954, as amended (68 Stat. 919), and Title II of the Energy Reorganization Act of 1974 (88 Stat. 1242). On-going regulation, supervision and inspection of the project by the NRC is extensive and comprehensive. Certain aspects of the project also require specific licenses and permits from the South Carolina Department of Health and Environmental Control (air and water discharges), the Federal Energy Regulatory Commission (FERC)(water intakes and outfalls), the United States Army Corps of Engineers (USACOE) (wetlands), the Federal Aviation Administration (aviation safety). The project is subject to regulatory oversight by these agencies to ensure its environmental compliance and compliance with strict nuclear safety standards.

> generation, and concluded that nuclear energy was the least costly alternative source, is supported by substantial evidence.

*Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 364, 369, 692 S.E.2d 910, 912, 915 (2010).

To order construction funding (and therefore construction) to cease on the plant as Complainants request would require the Commission to invalidate a duly issued Siting Act Certificate which was upheld on appeal by the South Carolina Supreme Court, and has been the basis for eight years of construction expenditures by SCE&G and Santee Cooper. This would be entirely inconsistent both with the 2009 Siting Act Certificate and the legislative policies underlying the BLRA. With specific reference to the orders issued in regards to this project, the South Carolina Supreme Court quoted with approval the following language from Commission Order No. 2009-104(A):

> [T]he BLRA was intended to cure a specific problem under the prior statutory and regulatory structure. Before adoption of the BLRA, a utility's decision to build a base load generating plant was subject to relitigation if parties brought prudency challenges after the utility had committed to major construction work on the plant. The possibility of prudency challenges while construction was underway increased the risks of these projects as well as the costs and difficulty of financing them. In response, the General Assembly sought to mitigate such uncertainty by providing for a comprehensive, fully litigated and binding prudency review before major construction of a base load generating facility begins. The BLRA order related to [the Units], is the result of such a process. It involved weeks of hearings, over 20 witnesses, a transcript that is more than a thousand pages long and rulings that have been the subject of two appeals to the South Carolina Supreme Court.

*S.C. Energy Users Comm. v. S.C. Elec. & Gas,* 410 S.C. 348, 359, 764 S.E.2d 913, 918–19 (2014).

Similarly, the courts of this state have long recognized that where construction proceeds under validly issued permits or exemptions from permit requirements, vested rights are created. See *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 498, 536 S.E.2d 892, 901 (Ct. App. 2000) (Vulcan could not be denied a certificate of occupancy for a quarry after it had "expended nearly $2 million to find granite on the 585 acre Princeton site, arranged for the removal of fifteen acres of overburden to expose the granite for extraction, and was merely awaiting a mine operating permit from DHEC when the restrictive zoning stopped the development.") "We have recognized the rule, that, when a zoning or building permit has been properly issued and the owner has incurred expenses in reliance thereon, he acquires a vested property right therein of which he cannot be deprived without cause or in the absence of public necessity." *Pure Oil Div. v. City of Columbia,* 254 S.C. 28, 34, 173 S.E.2d 140, 143 (1970); citing, *Willis v. Town of Woodruff,* 200 S.C. 266, 20 S.E.2d 699; *Pendleton v. City of Columbia,* 209 S.C. 394, 40 S.E.2d 499; *Nuckles v. Allen*, 250 S.C. 123, 156 S.E.2d 633;*c.f., Harrison Partners, LLC v. Renewable Water Res.*, No. 2015-UP-527, 2015 WL 7288155, (S.C. Ct. App. Nov. 18, 2015) (a developer's right to have a private utility own and operate a force main and pump station serving his development did not vest because the flow permit for those facilities was not issued nor did construction begin before the new regulatory structure went into effect).

The Complainants seek to abrogate a final, binding and fully vested Siting Act Certificate and relitigate the prudency of the construction of a base load plant while that construction is on-going. This request is patently unlawful for multiple reasons and the claims that embody it should be dismissed.

**3. The BLRA Does Not Authorize a Prudency Review of Cost Forecasts that the Utility Has Not Yet Sought to Adjust or Abandonment Decisions It Has Not Yet Made.**

The BLRA grants no general power to special interest groups or other third parties to force prudency reviews of a utility's construction plans or yet-to-be-determined revisions to BLRA approved schedules. To allow third parties to instigate such proceedings would be completely inconsistent with the statutorily-defined process by which the BLRA operates and the finality that the BLRA is intended to create.

The BLRA provides a utility with the option to seek a preconstruction prudency review of its decision to build a baseload plant. The decision to seek that review is discretionary. A utility "***may elect*** to come under the terms of [the BLRA]" by filing a BLRA application. S.C. Code Ann. § 58-33-230(A)(emphasis supplied).[5] If the utility does file a BLRA application, as SCE&G did in 2008, the Commission reviews the prudency of the decision to construct the plant and the cost and construction schedules, and other terms under which that plant will be built. S.C. Code Ann. § 58-33-250 or § 58-33-260. If the review is favorable, the Commission issues a BLRA order and establishes anticipated cost and construction schedules for the plant. *See* S.C. Code Ann. § 58-33-250.

[5] The decision to file to update cost and construction schedules under S.C. Code Ann. § 58-33-270(E), is discretionary with the utility. *Id.* ("[a]s circumstances warrant, the utility **may** petition the commission . . . for an order modifying any of the [BLRA] schedules . . . ")(emphasis supplied). A request for revised rates similarly is a request "the utility **may** file with the commission . . . ." See S.C. Code Ann. § 58-33-280(A) (emphasis supplied). The recovery of abandonment costs under S.C. Code Ann. § 58-33-280(K) is considered "as part of an Order adjusting rates under this article," *i.e.*, as a part of a revised rates filing under S.C. Code Ann. § 58-33-280 which the utility may file.

The BLRA expressly states that the determinations included in BLRA orders "may not be reopened in any subsequent proceedings." *Id.* at § 58-33-275(B). This finality is fundamental to the regulatory certainty that BLRA is intended to provide. As this Commission and the Supreme Court have ruled, the primary legislative purpose of the BLRA was "to cure a specific problem under the prior statutory and regulatory structure," which was that "a utility's decision to build a base load generating plant was subject to relitigation if parties brought prudency challenges after the utility had committed to major construction work on the plant." *S.C. Energy Users Comm. v. S.C. Elec. & Gas,* 410 S.C. at 359, 764 S.E.2d 913 at 918–19 (2014); *accord,* S.C. Code Ann. § 58-33-275(B). To allow special interest groups to instigate prudency proceedings under the BLRA where no relief has been sought by the utility would be unjustified by the language of the statute and would be entirely contrary to finality which is at the core of its legislative purpose and intent.

Under the BLRA, prudency reviews are only allowed where the utility files to update cost or construction schedules or seeks other changes in exiting BLRA orders. The BLRA specifically allows for the filing of these proceedings to update BLRA orders, and for the annual filing for revised rates as construction budgets are spent. Under the BLRA, parties may bring prudency challenges to specific costs, transactions and decisions in these proceeding. S.C. Code Ann. § 58-33-240(D). Specifically, parties may bring prudency challenges to specific costs, transactions and decisions where:

- The utility seeks to change the approved cost schedules for a plant or otherwise modify findings in a BLRA order through an update filing made under S.C. Code Ann. § 58-33-270(E);
- The utility seeks to include in a revised rate filing costs which are shown to be in excess of approved schedules, and so are subject to challenge under S.C. Code Ann. § 58-33-275(E); and
- The utility decides to abandon a plant and files to recover abandonment costs through revised rates filings under S.C. Code Ann. § 58-33-280(K).

In such cases, a prudency review is statutorily authorized as to the matters presented but only after the utility has filed under the applicable provisions of the BLRA. *See* S.C. Code Ann. §§ 58-33-270(E) and 58-33-275(E). The utility's filing thus provides a clear scope and focus for the prudency review. Waiting for the filing to occur also ensures that matters will be ripe for review, *i.e.,* that options for the project that have been fully evaluated, plans and schedules have been finalized, costs have been quantified and concrete data and analyses have been prepared that can be cogently reviewed. Failing to await filing by the utility raises the possibility that consideration of these matters will be premature and issues will not be fully framed or ripe for determination, dangers that are fully present here. Withholding review until the utility files for relief also guarantees that that there is specific and statutorily-authorized action that the Commission may take on the record that is created. Specifically, the Commission may approve, disapprove or approve with modification the relief requested by the utility. All of these matters support the justiciability of the claims presented. *See generally*, *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 227–28, 467 S.E.2d 913, 918 (1996); *Kurschner v. City of*

*Camden Planning Comm'n,* 376 S.C. 165, 175, 656 S.E.2d 346, 352 (2008); *Tracy v. Tracy*, 384 S.C. 91, 100, 682 S.E.2d 14, 19 (Ct. App. 2009).

The approach taken under the BLRA to these matters is not unusual, but is entirely consistent with practice under general cost of service ratemaking statutes. Where the Commission and ORS are statutorily empowered to regulate the utility's rates, the operative statutes provide that the utility will come before the Commission, and file new rates and charges that it deems to be just and reasonable. See S.C. Code Ann. §§ 58-27-810 *et seq*.[6] Using the historical test year methodology, the Commission measures the utility's allowable costs during a test period to determine what constitutes reasonable utility costs going forward. *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (1992). In this way, the Commission determines what part of the money spent by the utility during the test year was a reasonable and prudent expense of providing utility service to customers and therefore should be reflected in setting rates *prospectively,* and what was not. *See Hamm v. S. C. Pub Serv. Comm.,* 315 S.C. 119, 123, 432 S.E. 2d 242, 456 (1993). In no case do the statutes authorize the Commission to make prudency determinations related to specific projects or transactions unmoored from any rate action before it.

[6] When the Commission determines that declining costs or increasing sales have resulted in excessive rates, generally through a request for a rule to show cause filed by ORS, it may order the utility to come before the Commission to justify that the current rates are just and reasonable. See S.C. Code Ann. § 58-27-850. In effect, the utility is required to justify its existing rates as if they were a new rate filing. The ratemaking process then proceeds as if the utility had filed to revise its base rates.

To proceed with the claims asserted here would create a new class of proceedings, free-standing prudency reviews of specific utility projects not tied to cost-of-service regulatory filings. This would invite any interest group or individual that disfavors a utility project to petition the Commission for a prudency review that project –be it a transmission line; a water, sewer or natural gas line; a gas turbine; a solar or wind farm; or other facility. If such a proceeding is authorized here, it would be authorized even if the project had been granted a final and fully litigated Siting Act Certificate and was already years into construction process when the prudency claim was raised. Allowing such proceedings to go forward would risk turning cost-of-service ratemaking into a general purpose tool for special interest groups to challenge projects that they find objectionable whatever grounds be they land use, environmental policy or nuclear safety grounds. This is neither legally permissible nor good regulatory policy.

S.C. Code Ann. § 58-33-275(E) is the principal statutory authority on which the Friends of the Earth and the Sierra Club rely in their Complaint/Petition. In construing this statute, the South Carolina Supreme Court has ruled as follows:

> [S]ection 58–33–275(E) applies . . . **after a utility has already deviated from an existing base load review order and attempts to recoup costs from the deviation**. In that situation, a party must demonstrate by a preponderance of the evidence that the utility has deviated from the original base load review order, and then the utility may only recoup costs that were not the result of imprudence.

S.C. Energy Users Comm. v. S.C. Elec. & Gas, 410 S.C. 348, 357, 764 S.E.2d 913, 917 (2014) (emphasis supplied). Therefore, the necessary prerequisite to a prudency review under S.C. Code Ann. § 58-33-275(E) is the filing of a revised rates that attempts to recoup costs that result from a deviation.

Similarly, the South Carolina Supreme Court has ruled that S.C. Code Ann. § 58-33-270(E) applies where the prudency of a proposed modification to cost schedules is at issue. *S.C. Energy Users Comm. v. S.C. Elec. & Gas*, 410 S.C. at 357, 764 S.E.2d at 917 ("we find the BLRA contemplates changes to an initial base load review order and provides the mechanism to accomplish such changes in section 58–33–270, not section 58–33–275"). However, until there is a request to modify schedules, there is nothing for the Commission to review under S.C. Code Ann. § 58-33-270(E). Similarly, until there is a decision to abandon construction of a plant, there is no abandonment decision to review under S.C. Code Ann. § 58-33-280(K).

Accordingly, the Complainants' claims seeking a statutorily unauthorized prudency review should be dismissed.

**4. The Claims for a Review of Alternative Energy Resources Cannot Support an Adjudicatory Proceeding Standing Alone**

The Complainants' request that the Commission evaluate "the available least cost efficiency and renewable energy alternatives" is tied to the claims that the Commission should review the prudency of continuing construction of the nuclear unit and order the funding of construction to cease. Without the underlying claims, this review has no substance and cannot support the granting of any relief by the Commission. Accordingly, it cannot be the basis of a contested case proceeding which requires that the proceeding be one "in which the legal rights, duties, or privileges of a party are **required by law to be determined** by an agency after an opportunity for hearing." S.C. Code Ann. § 1-23-310(3) (emphasis added).

**5. Ripeness, Mootness and Administrative Efficiency**

The South Carolina Supreme Court has applied a two part test to determine whether claims are ripe for review: "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 227–28, 467 S.E.2d 913, 918 (1996); *accord*, *Kurschner v. City of Camden Planning Comm'n,* 376 S.C. 165, 175, 656 S.E.2d 346, 352 (2008); *Tracy v. Tracy*, 384 S.C. 91, 100, 682 S.E.2d 14, 19 (Ct. App. 2009). In this case, SCE&G has not completed its analysis and evaluation of the cost and other factors associated with completing or abandoning the project, nor has it determined the most prudent path forward for the project. Moreover, any future path forward for the project will also depend on the results of Santee Cooper's parallel analysis and evaluation of the project. As a 45% co-owner, Santee Cooper's decision as to what future path best supports the interests of it system and customers is of paramount importance to the practicality of any path forward that SCE&G might select. In these circumstances, the issues related to the reasonableness and prudency of any path forward selected by SCE&G cannot be efficiently or effectively determined. They are not fit for review at this time.

Similarly, there is little if any burden on the Complainants from waiting until such a decision is made and can be presented to the Commission for review. Proceeding to hearing in this matter would not avoid the need for SCE&G to file a second, statutorily-authorized proceeding to consider the BLRA adjustments that will be required once it determines a path forward for the project. Therefore, to move forward with a hearing on the Complaint/Petition would likely result in unnecessary duplication of proceedings, confusion and a waste of administrative resources, all of which would be an affirmative burden on Complainants, the

regulatory process and other parties. *See* 10 S.C. Code Ann. Regs. 103-802, (the Commission's rules are "intended to promote efficiency in, and certainty of, the procedures and practices.") For that reason, there is little if any additional burden place on the Complainants by asking them to wait to present their claims for hearing until this decision is made. For these reasons, the Complaint/Petition should be dismissed as failing the ripeness test.

## CONCLUSION

The Complaint/Petition represents the second attempt by members of the environmental community to force the Commission to review whether or not SCE&G's decision to continue construction of the Units is prudent before that decision is made. On March 27, 2017, Mr. Tom Clements filed a document styled as a "Request for Emergency Hearing Regarding Troubling Situation with SCE&G's Nuclear Construction Project and Westinghouse Bankruptcy Impact: Urgent Need for Action in the Public and SCE&G Interest by SC PSC, ORS" (the "Request"). The Commission considered this Request and by Directive Order 2017-303, dated May 17, 2017, denied it. The Commission found that "[t]hese are . . . complex and developing matters" and a would be appropriately considered in future proceedings once SCE&G and Santee Cooper's ongoing evaluations were complete. This conclusion remains correct. For the reasons set forth above, the Commission should dismiss the Complaint/Petition in this matter, which in any event, will become moot when SCE&G files its petition for review and approval of its plans for the Units in light of the Westinghouse bankruptcy.

## SUSPENSION OF THE PREFILING ORDER AND OTHER MATTERS

Pending a ruling on this motion to dismiss, SCE&G respectfully requests that the Commission suspend the schedule for pre-filing testimony in this docket and all discovery

deadlines and issue a revised pre-filing schedule if one is needed after this motion has been decided.

Respectfully submitted,

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Cayce, South Carolina
July 19, 2017

**BEFORE**
**THE PUBLIC SERVICE COMMISSION OF**
**SOUTH CAROLINA**
**DOCKET NO. 2017-207-E**

**IN RE:**
Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent

**CERTIFICATE OF SERVICE**

This is to certify that I have caused to be served this day one copy of SCE&G's Motion to Dismiss Complaint/Petition of Friends of the Earth and Sierra Club to the persons named below at the addresses set forth via U.S. First Class Mail and electronic mail:

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